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In the Supreme Court

MICHAEL RODAK, JR., CLERK

OF THE

United States

OCTOBER TERM, 1977

No. 77-2931

EZRA KULKO,  
*Appellant,*

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND  
FOR THE CITY AND COUNTY OF SAN FRANCISCO;  
SHARON KULKO HORN,  
*Appellees.*On Appeal from the Supreme Court of  
the State of California

## JURISDICTIONAL STATEMENT

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August 1977

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**JURISDICTIONAL STATEMENT**

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Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, Appellant Ezra Kulko, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment entered by the Supreme Court of the State of California in this case and should exercise such jurisdiction herein.

### OPINIONS BELOW

The opinion of the Supreme Court of the State of California appears in 19 Cal.3d 514, 138 Cal. Rptr. 586, 564 P.2d 353 and is included herein as Appendix A.

The above opinion of the California Supreme Court vacated the opinion rendered by the Court of Appeal, First Appellate District of the State of California, appearing in 133 Cal.Rptr. 627 and which is included herein as Appendix B.

### JURISDICTIONAL STATEMENT

The underlying action is one brought by appellee, Sharon Kulko Horn, against Appellant Ezra Kulko, to establish foreign judgment of divorce; to modify said foreign judgment so as to award full custody of minor children, and to increase child support payments to Mrs. Kulko. (Horn vs. Kulko, Superior Court of the State of California for the City and County of San Francisco, No. 701-626)

This appeal arises from a proceeding wherein Appellant sought a writ of mandate directing Appellee, Superior Court of the State of California of the City and County of San Francisco (hereafter Superior Court), to vacate its order denying Appellant's motion to quash service of summons for lack of jurisdiction in the underlying action.

The judgment of the Supreme Court of the State of California was entered on May 26, 1977, and became final on June 25, 1977. (California Rules of

Court, Rule 24(a)) A timely notice of appeal was filed on August 3, 1977.

The jurisdiction of this Court is invoked under the provisions of Title 28 of the United States Code, Section 1257, subparagraph (2).

Cases that sustain the jurisdiction of this Court include:

*Cohen v. California* (1971) 91 S.Ct. 1780, 403 U.S. 15, 29 L.Ed.2d 284, rehearing denied 92 S.Ct. 26, 404 U.S. 876, 30 L.Ed.2d 124;  
*Huffman v. Pursue, Ltd.* (1975) 95 S.Ct. 1200, 420 U.S. 592, 43 L.Ed.2d 482;  
*Charleston Federal Savings and Loan Association v. Anderson* (1945) 65 S.Ct. 621, 324 U.S. 182, 89 L.Ed. 857, rehearing denied.

In the event that the Court does not consider appeal the proper mode of review, Appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a Petition for Writ of Certiorari pursuant to 28 U.S.C. §2103.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The validity of Section 410.10 of the California Code of Civil Procedure as construed by the Supreme Court of the State of California is here involved. C.C.P. §410.10 states:

"A court of this State may exercise jurisdiction on any basis not inconsistent with the Constitution of this State or of the United States."

In opposition to the California Supreme Court's construction of the above-quoted statute stands the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which is also herein involved.

#### QUESTION PRESENTED

Whether California's construction of C.C.P. 410.10, extending in personam jurisdiction over the nonresident appellant violates the Due Process Clause of the Fourteenth Amendment?

#### STATEMENT OF THE CASE

Appellant and Mrs. Horn were married in California on July 29, 1959, during Appellant's three-day stopover in that state while en route to Korea, where he was serving in the Armed Forces of the United States. Dr. Kulko's only other visit to California was for approximately 24 hours on his return trip from Korea to New York—again a stopover incidental to his military service.

At the time of the marriage, both parties were residents of the State of New York. Appellant is and always has been a resident of New York.

Two children were born of the marriage: Darwin, born June 23, 1961, and Ilsa, born July 10, 1962. (Appendix A, page ii) Both children were born in New York and continuously resided in that state until the transpiring of the events presented herein.

Dr. Kulko and Appellee Horn separated in March 1972. Mrs. Horn then took up residence in San Francisco, California. The parties executed a written separation agreement in New York on September 19, 1972. Immediately thereafter, the parties flew to Haiti where Mrs. Horn was granted a Decree of Divorce on September 25, 1972. (Appendix A, page ii) The written separation agreement was attached to the divorce decree and made a part thereof.

In material part, the written separation agreement provided:

**"THIRD:** The parties hereto hereby agree to the following with respect to the care, custody and control of the aforementioned children of their marriage:

1. That during the period of the year when the children are attending school, said children shall reside with and remain in the care, custody and control of the Husband.

2. That during the summer months of mid-June, July, August and mid-September, and during Christmas and Easter vacation weeks, said children shall reside with and remain in the care, custody and control of the Wife.

\* \* \*

**"FOURTH:** The Husband hereby agrees to pay to the Wife the sum of \$3,000.00 annually for the support and maintenance of their said children during the aforementioned periods when said children reside with and are in the care, custody and control of the Wife. . . ."

Significantly, there was no agreement between the parties as to who would bear the costs of transport-

ing the children between California, Appellee Horn's new residence, and New York, where Dr. Kulko continued to reside.

In December of 1973 and just prior to her departure to California to spend Christmas vacation with her mother, Ilsa notified Appellant that she intended to live in California with her mother. Appellant, defeated by his teenaged daughter's announcement, purchased for her a one-way ticket to California. Ilsa then commenced to reside in San Francisco with her mother during the school year, spending vacations with Appellant. (Appendix A, page iii)

Darwin, meanwhile, had continued to live with his father. On January 10, 1976, Darwin called his mother and informed her that he wanted to live in San Francisco with her, and his sister. Thereupon, Mrs. Horn surreptitiously sent her son a ticket for air passage to California. Darwin immediately joined his mother, leaving New York without either the knowledge or consent of his father. (Appendix A, page iii)

On February 5, 1976, Mrs. Horn commenced the underlying action to establish the foreign judgment of divorce as a California judgment and to modify said judgment so as to award her full custody of the children, in addition to an increased amount for child support payments to be paid by Appellant. (Appendix A, page iv)

Appellant was served with a summons by mail in New York. Dr. Kulko then appeared specifically through counsel and moved for an order from Ap-

pellee Superior Court to quash service of summons pursuant to Section 418.10, Subdivision (a)(1) of the California Code of Civil Procedure, which provides:

"(a) A defendant, on or before the last day of his time to plead or within such further time as the court may for good cause allow, may serve and file a notice of motion either or both:

(1) To quash service of summons on the ground of lack of jurisdiction of the court over him."

\* \* \*

In his Memorandum of Points and Authorities in Support of Motion to Quash Service of Summons (included in the Record herein), Appellant maintained that the service should be quashed on grounds that (1) he was not a resident of California and (2) he did not have the requisite minimum contacts with the State of California to satisfy the requirements of Due Process. Appellant further stressed:

"Minimum contact for due process purposes requires at the very least an act by the defendant which produces an effect within the state so as to make the exercise of jurisdiction reasonable." (citing *Belmont Industries v. Superior Court* (1973) 31 Cal.App.3d 281, 285-6, 107 Cal.Rptr. 247)

Finally, Appellant referred to *International Shoe Co. v. Washington* (1945) 326 U.S. 310, 316-17, 66 S.Ct. 154, 90 L.Ed. 95, when he cited the California case of *Titus v. Superior Court* (1972) 23 Cal.App.3d 792, 802, 100 Cal.Rptr. 477, 484, wherein the court equated "minimal contacts" with the term "relation-

ship to the State" and held that where a non-resident defendant father neither intended his activity outside California to cause any effect in that state, nor could have foreseen that it would, California did not have jurisdiction over him for the purposes of imposing child support obligations.

On May 17, 1976, Appellee Superior Court summarily denied Appellant's Motion to Quash. A copy of the minute order of Appellee Superior Court entered May 17, 1976, is attached as Appendix C herein.

Appellant filed his Petition for a Writ of Mandate appealing from the order of Appellee Superior Court with the California Court of Appeal, First Appellate District, on June 16, 1976.

In his Petition for a Writ of Mandate directing Appellee Superior Court to vacate the order of denial of Appellant's Motion to Quash and to enter an order granting Dr. Kulko's Motion, Appellant reiterated the federal question of Dr. Kulko's right to due process. Appellant pointed out:

"The order of respondent court [Appellee Superior Court] entered May 17, 1976, denying petitioner's motion to quash service of summons . . . is in excess of the jurisdiction of respondent court, and in violation of constitutional, statutory and precedential limitations on its jurisdiction, in that it violates petitioner's [appellant's] right to due process in that he is not afforded a reasonable opportunity to be heard:

(a) California Code of Civil Procedure §410.10:

'A court of this state may exercise jurisdiction on any basis not inconsistent with the

Constitution of this state or of the United States"

(b) [Amendment] V, Constitution of the United States:

'nor shall any person . . . be deprived of life, liberty, or property, without due process of law; . . .

(c) Precedential law setting forth constitution[al] limitations on jurisdiction:

*Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565;  
*Milliken v. Meyer*, 311 U.S. 457, 61 S.Ct. 339,  
85 L.Ed. 278;

*International Shoe Co. v. State of Washington*,  
326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95;

*Titus v. Superior Court of the State of California, in and for the County of Contra Costa*,  
23 Cal.App.3d 792, 100 Cal.Rptr. 477 (1972);

*Inselberg v. Inselberg*, 128 Cal.Rptr. 578  
(1976)."

(Petition for Writ of Mandate with Memorandum of Points and Authorities, pages 4-5).

In his Memorandum of Points and Authorities attached to his Petition for a Writ of Mandate, in addition to citing the previously mentioned *Titus* case, Appellant discussed *Inselberg v. Inselberg* (1976) 56 Cal.App.3d 484, 128 Cal.Rptr. 578—a California case reiterating the well-established constitutional principle that a forum state may subject a non-resident to in personam jurisdiction if he has both (1) "mini-

mun contacts" with the forum and (2) if maintenance of the suit does not offend the "traditional conception of fair play and substantial justice. (Citations)" (*Inselberg, supra*, 128 Cal.Rptr. 581)

Appellant further stated:

"If a nonresident's activities in the forum state are 'extensive or wide-ranging' or 'substantial . . . continuous and systematic,' jurisdiction for all causes of action is warranted. If not, then *jurisdiction depends on the quality and nature of the activities in relation to the particular cause of action* [Emphasis added]. The crucial inquiry thus concerns the character of the non-resident's activity in the forum, the substantiality of the connection of the cause of action with that activity, the balance of the convenience of the parties, and the interests of the state in assuming jurisdiction. (*Cornelison v. Chaney*, 16 Cal.3d 143, 127 Cal. Rptr. 352, 545 P.2d 264)"

(Petition for Writ of Mandate with Memorandum of Points and Authorities, page 11).

The Court of Appeal in its short opinion, Appendix B herein, found that California had personal jurisdiction over the Appellant within the constitutional limitations of C.C.P. §410.10 in that Appellant has "caused an effect in the state by an act done elsewhere." (Appendix B, page xxi) The Court of Appeal, in denying Appellant's petition, reasoned that Dr. Kulko "consented to the decision of his children to move to California and to take up residence with their mother," and that "such conduct"—i.e., his consenting—was "an act, or acts, causing an effect" in

California giving rise to a basis for in personam jurisdiction. (See Appendix B, pages xxi through xxii)

On November 17, 1976, Appellant filed his petition to the Supreme Court of the State of California for a hearing to consider the Court of Appeal's denial of his Petition for a Writ of Mandate.

In his Petition for Hearing, Appellant raised the federal question of due process for the third time:

"The effect of the denial by the Court of Appeal of Petitioner's request that service of summons be quashed for lack of personal jurisdiction is to violate Petitioner's constitutional right to due process in that he is not afforded a reasonable opportunity to be heard. *California Code of Civil Procedure* §410.10, [Amendment] V, Constitution of the United States, [Amendment] XIV, Constitution of the United States.

A hearing by this Court is required for the settlement of an important question of law, to wit:

Whether a California court has personal jurisdiction over a nonresident under Code of Civil Procedure Section 410.10 on the basis that he has caused an effect in the state by an act done elsewhere where the appellate court assumed that Petitioner voluntarily consented to his children's residence in California based on the trial court's ruling, and ruled that such conduct constituted an act causing an effect in this state. . . ."

(Petition for Hearing, page 2)

In its opinion denying Appellant's Petition for a Writ of Mandate after Appellee Superior Court de-

nied Dr. Kulko's Motion to Quash Service of Summons, the Supreme Court explained that an "effect" in a forum state by an act of a non-resident is a basis for in personam jurisdiction:

"As we explained in *Sibley* [*Sibley v. Superior Court* (1976) 16 Cal.App.3d 442, 445, 128 Cal. Rptr. 34, 546 Pac.2d 322], 'One of the recognized bases for jurisdiction in California arises when the defendant has caused an "effect" in the state by an act of omission which occurs elsewhere.' (16 Cal.3d at p. 445, 128 Cal.Rptr. at p. 36, 546 P.2d at p. 324; see also *Judd v. Superior Court* (1976) 60 Cal.App.3d 38, 43, 131 Cal.Rptr. 246; *Qualtrone v. Superior Court*, *supra*, 44 Cal.App. 3d 296, 304-306, 118 Cal.Rptr. 548; *Titus v. Superior Court*, *supra*, 23 Cal.App.3d 792, 801-802, 100 Cal.Rptr. 477.)"

(Appendix A, page v)

Yet the majority opinion of the California Supreme Court added this caveat:

"It is at once apparent that the potential scope of this basis of jurisdiction is almost unlimited since any act or omission of a defendant anywhere in the world causing an 'effect' in California could theoretically subject him to in personam jurisdiction in California. If this theory of jurisdiction were carried out to its full extremes, it is obvious that it would discourage those outside California from having any contacts or relations with persons living in our state. It has therefore been recognized that the mere causing of an effect in California is not necessarily sufficient to supply a constitutional basis for jurisdiction. 'A state has power to exercise judicial jurisdiction over an individual who causes effects

in the state by an omission or act done elsewhere with respect to causes of action arising from these effects, unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable' " (Citations).

(Appendix A, pages v through vi)

The case of *Sibley*, *supra*, alluded to both *International Shoe*, *supra*, and *Hanson v. Denckla* (1958) 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283. Citing *Sibley*, the California Supreme Court:

"... emphasized the importance of showing on the record that the nonresident 'purposely availed himself of the privilege of conducting business in California or of the benefits and protections of California laws ... [or] anticipated that he would derive any economic benefit as a result of his' act outside of California. (Citations) We conclude therefore that once it has been established that a nonresident defendant has caused an effect in this state by an act or omission elsewhere, the reasonableness of exercising personal jurisdiction over him on this basis may be determined according to the above criteria."

(Appendix A, pages vi through vii)

The four-justice majority opinion went on to conclude that where a non-resident defendant commits an act or omission elsewhere that has an effect in California, and it is shown that defendant has "purposely availed himself" of the benefits and protections of California law, or, at least, anticipated that he would derive economic benefits in so acting, that California in exercising in personam jurisdiction over

him is acting both reasonably and constitutionally. (See Appendix A, pages v through vii)

In holding that the exercise of jurisdiction over Dr. Kulko was reasonable, the California Supreme Court initially observed:

"... that probably no parental act more fully invokes the benefits and protections of California law than that by which a parent permits his minor child to live in California. The parent thereby avails himself of the total panoply of the state's laws, institutions and resources . . . Therefore, we start with the premise that a nonresident parent who allows his minor child or children to reside in California has by that act purposely availed himself of the benefits and protections of the laws of California to such an extent that absent unusual circumstances or countervailing public policies such act would support personal jurisdiction over the nonresident parent for actions concerning the support of these children."

Applying the above premise to the facts of the instant case, the Supreme Court of California held that Appellant, by purchasing a one-way plane ticket to California for his daughter<sup>1</sup> and surrendering custody of her to Appellee, Mrs. Horn, "actively and fully consented" to his daughter taking up residence in California. The California Supreme Court went on to hold that by consenting to his daughter's contemplated permanent residence in California, Appellant "purposely availed himself of the full protection and

<sup>1</sup>Significantly, under the separation agreement, Appellant was under no obligation whatsoever to purchase air passage—either round trip or one way—for his children when they were visiting their mother in California.

benefit of California laws." In addition, the California Supreme Court held that Appellant "derived immediate economic benefit" from these purposeful "acts." (See Appendix A, page xi)

Finally, the majority recognized that Appellant "at no time undertook any affirmative act to purposely avail himself of the benefit and protection of the laws and institutions" of California with respect to his son, Darwin. (Appendix A, page xii) However, the California court held that Dr. Kulko was subject to in personam jurisdiction for the support of both children:

"We deem it fair and reasonable for defendant to be subject to personal jurisdiction for the support of both children, where he has committed acts with respect to one child which confers personal jurisdiction and has consented to the permanent residence of the other child in California."

(Appendix A, page xiii)

Dissenting Justices Richardson and Clark squarely disagreed on all points. Justice Richardson, in writing the dissenting opinion, began by reaffirming the principles set forth in *Sibley, supra*.

"I have no quarrel with the majority's statement of general legal principles, derived primarily from our recent decision in *Sibley v. Superior Court* (1976) 16 Cal.3d 422, 128 Cal. Rptr. 34, 546 P.2d 322, and cases cited therein. As *Sibley* explains, however, 'The mere causing of an "effect" in California, . . . is not necessarily sufficient to afford a constitutional basis for jurisdiction; notwithstanding this "effect," the im-

position of jurisdiction may be "unreasonable." [Citations] In determining whether or not to impose jurisdiction, *Sibley* explains that it is necessary for the court to ascertain whether the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' (P. 447, 128 Cal.Rptr. p. 37, 546 P.2d p. 325)" [Emphasis supplied]

(Appendix A, pages xiv through xv).

The dissent went on to acknowledge that the controlling principle relevant in the determination of the *Sibley* court was derived from the leading U.S. Supreme Court opinion in *Hanson v. Denckla, supra*, 357 U.S. at 253, 78 S.Ct. at 1239, where this Court held:

"The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

(Appendix A, page xv).

Justice Richardson disagreed with the majority opinion's application of *Sibley* to the present case, in that Appellant's passive submission to his teenaged daughter's unilateral decision to live in California and his mere purchase of Ilsa's air passage to California could in no way be reasonably considered a

purposeful availment of the benefits and protections of California laws:

"The majority reasons, without citation of supporting authorities, that whenever a parent 'permits' his minor child to reside in California, the parent thereby 'avails himself of the total panoply of the state's laws, institutions and resources. . . .' [Citations] Yet, can such an act of acquiescence fairly and realistically be viewed as 'purposeful' conduct? According to respondent, Ilsa 'told' petitioner that she was going to live with respondent in California. Petitioner's unresisting assent to Ilsa's decision discloses no intent on his part, purposeful or otherwise, to enjoy the 'panoply' of California's resources."

(Appendix A, pages xvi through xvii).

Finally, the dissent notes that Appellant took neither direct nor indirect action to invoke the protections of California law with respect to his son, who left for California without either Dr. Kulko's consent or knowledge. (See Appendix A, page xvii)

The judgment of the California Supreme Court became final thirty days after entry of the judgment; i.e., June 25, 1977. (Cal. Rules of Court, Rule 24 (a))

Notice of Appeal to the United States Supreme Court was timely filed on August 3, 1977, and is included herein as Appendix D.

#### THE FEDERAL QUESTIONS ARE SUBSTANTIAL

As construed by California's highest court, C.C.P. Section 410.10 enables California to exercise in per-

sonam jurisdiction over a nonresident father whose sole connection with that forum state was the mere purchase of one-way air passage for his teenaged daughter after he passively submitted to her decision to live with her mother in that state. This far-reaching extension of California's long arm statute and the implications thereof raise serious questions under the Due Process Clause of the Fourteenth Amendment. Further, and perhaps even more important, the California decision will have an inhibiting effect on the free interstate flow of children of divorced parents living in different states.

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**CALIFORNIA'S CONSTRUCTION OF C.C.P. §410.10 DENIES APPELLANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT.**

This Court has long held that in order to subject a nonresident defendant to in personam jurisdiction, Due Process requires that he have certain minimum contacts with the state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (*International Shoe, supra*)

The Supreme Court, in view of the "traditional notions of fair play and substantial justice," has further delineated the boundaries of permissive state jurisdiction over the nonresident defendant, stating:

"The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with

the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. . . ."

(*Hanson v. Denckla, supra*, 357 U.S. at 253, 78 S.Ct. at 1239, emphasis added).

California's long-arm statute, C.C.P. §410.10 provides:

"A court of this State may exercise jurisdiction on any basis not inconsistent with the Constitution of this State or of the United States."

As aptly put by the United States Court of Appeals, Ninth Circuit in *Republic International Corporation v. Amco Engineers, Inc.* (9th Cir. 1975) 516 F.2d 161, 167:

"This is indeed a long arm. We have described it in this fashion. 'The jurisdiction of California courts is therefore coextensive with the outer limits of due process under the state and federal constitutions, as those limits have been defined by the U.S. Supreme Court.' *Threlkeld v. Tucker*, 496 F.2d 1101, 1103 (9th Cir. 1974)."

Previous to the instant case, California courts have acknowledged that C.C.P. §410.10 was subject to due process limitations. In *Buckeye Boiler Co. v. Superior Court of Los Angeles County* (1969) 71 Cal.2d 893, 80 Cal.Rptr. 113, 458 P.2d 57, the California

Supreme Court extensively cited the language of *Hanson v. Denckla, supra*:

"A defendant not literally 'present' in the forum state may not be required to defend [himself] in that state's tribunal unless the 'quality and nature of the defendant's activity' in relation to a particular cause of action makes it fair to do so [citations]. Such a defendant's activities must consist of 'an act done or transaction consummated in the forum State' or 'some [other] act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws.' (*Hanson v. Denckla, supra*, 357 U.S. at pages 251, 253, 78 S. Ct. at pages 1238, 1240.)"

(*Buckeye Boiler*, 80 Cal.Rptr. at pages 117 to 118).

The *Buckeye* court recognized that in order to assume jurisdiction over a nonresident, due process requires not only a finding of the "threshold of sufficient activity" in the forum state, but also required is a balancing of the inconvenience to the defendant in having to defend himself in the forum state against the interest of the plaintiff in suing locally and the interrelated interest of the state in assuming jurisdiction. (*Buckeye, supra*, 71 Cal.2d at 899, 80 Cal. Rptr. at 118) In sum:

"To conclude that the assumption of jurisdiction over a defendant comports with due process does not end the inquiry; the exercise of jurisdiction must be reasonable as well."

(*Republic International Corporation, supra*, 516 F.2d at 167, citing *Buckeye, supra*).

In the recent case of *Sibley, supra*, the California Supreme Court employed a "cause-effect" test in California's exercise of in personam jurisdiction:

"One of the recognized bases for jurisdiction in California arises when the defendant has caused an 'effect' in the state by an act or omission which occurs elsewhere."

(*Sibley, supra*, 16 Cal.3d at 445, 128 Cal.Rptr. at 36, citing *Quattrone v. Superior Court, supra*, and *McGee v. International Life Insurance Company* (1957) 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223).

Yet the *Sibley* court recognized that the unfettered application of the above "cause-effect" test would be both potentially limitless and "constitutionally 'unreasonable.' " (*Sibley, supra*, 16 Cal.3d at 446, 128 Cal.Rptr. at 37) Relying on *Hanson v. Denckla, supra*, the California Supreme Court in *Sibley* then limited the "cause-effect" test by stating that the prerequisite finding for the reasonable exercise of jurisdiction is the "purposeful availment" of either (1) the privilege of conducting business in California or (2) the benefits and protections of California law. (See *Sibley, supra*, 16 Cal.3d at pages 446 to 447, 128 Cal.Rptr. pages 36-37)

It is submitted that the exercise of personal jurisdiction over Appellant is manifestly contrary to the explicit rules set forth in the United States Supreme Court cases of *International Shoe v. Washington, supra*, and *Hanson v. Denckla, supra*, as well as the

California cases of *Buckeye Boiler Company, supra*, and *Sibley, supra*.

(1) Appellant's conduct was not purposeful.

Dr. Kulko merely submitted when his teenage daughter announced her decision to reside in California. Such negative conduct can in no way be considered "purposeful."

(2) Appellant has not invoked the benefits and protection of California laws.

The Record establishes no intent whatsoever on Dr. Kulko's part of having any connection with California, with the exception of the purchase of one-way air passage which he was under no obligation to purchase in the first place. On the contrary, in his efforts to be a loving and accommodating father, the California laws, from which Dr. Kulko has allegedly derived benefit and protection, have forced him to defend his constitutional rights all the way up to the highest court in the land.

(3) The imposition of in personam jurisdiction over Appellant is manifestly unreasonable.

The agreement which Mrs. Horn seeks to modify was written and executed in New York. Appellee Horn, either on her own or through counsel retained in New York, could have promptly modified the agreement in Appellant's home state. It is a matter of record that this might not have even been necessary, since Appellant, prior to the action commenced by Mrs. Horn, offered to renegotiate the settlement agree-

ment. (See Appendix B, pages xxi through xxii) Further, to subject Appellant to personal jurisdiction is unreasonable, in that Mrs. Horn could conceivably institute repeated modification actions in the future, thereby forcing Appellant to come to California to defend multiple, and possible vexatious, lawsuits.

To exercise jurisdiction over Appellant, who has not set foot in California since 1951, and who has committed no "purposeful" acts other than the passive acceptance of his daughter's mandate, and who has been compelled to specially appear because of the unilateral activity of Appellee, Mrs. Horn, and the children of the marriage, offends "traditional notions of fair play and substantial justice." (*International Shoe v. Washington, supra*; *Hanson v. Denckla, supra*) To allow California courts to exercise jurisdiction in the present case will insure the "potentially limitless" and "unreasonable" exercise of jurisdiction that the *Sibley* court warned against. By logical extension, it would be a matter of time before a collect phone call paid for by a California resident would be sufficient to give rise to jurisdiction over the out-of-state caller, who "purposefully" made that phone call and caused an effect in California, since the resident of the forum state must pay for the call, allowing the nonresident to derive "immediate economic benefit" therefrom.

Aside from the clear infringement of Appellant's right to due process of law, there are grave implica-

tions in the holding of the California Supreme Court in the present case:

In 1970, 15% of all children under 18 years of age were living with one or both parents who had been divorced after their first or most recent marriage.<sup>3</sup>

Of children of school age, more than 30% were living with a divorced parent in 1971.<sup>4</sup>

Given our highly mobile society and the fact that the amount of children involved in divorce was close to one million in 1971 alone,<sup>5</sup> the total number of children in the United States with divorced parents living in two separate states must be quite substantial.

In view of the above statistics, the holding of the California Supreme Court contravenes the "strong" public policy which California courts have repeatedly asserted in favoring the visitation of children with their natural parents and in encouraging cooperation between divorced parents. (See the dissenting opinion in Appendix A, pages xvi through xviii) Out-of-state parents would have substantial ground to refuse to allow their children to visit the California parents, lest in personam jurisdiction be conferred over the nonresident. The rule announced in the present case thus encourages prudent nonresident parents to refuse all cooperation and visitation with California

<sup>3</sup>Paul C. Glick, *Journal of Marriage and the Family*, Volume 37, No. 1 (February 1975), "The Demographer Looks at American Families," page 21. (Mr. Glick is employed by the population Division, Bureau of the Census.)

<sup>4</sup>*Ibid*, page 22.

<sup>5</sup>*Ibid*, page 22.

parents, thus is in direct opposition to the well-established "strong" public policies enunciated in the California cases of *Judd v. Superior Court* (1976) 60 Cal.App.3d 38, 45, 131 Cal.Rptr. 246, and *Titus v. Superior Court* (1972) 23 Cal.App.3d 792, 803, 100 Cal.Rptr. 477.

#### CONCLUSION

For the foregoing reasons, Appellant respectfully submits that this Court has jurisdiction over this Appeal under Section 1257 (2), Title 28, United States Code, and that this Appeal brings before the Court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Dated, August 11, 1977.

Respectfully submitted,  
LAWRENCE H. STOTTER,  
STERN, STOTTER & O'BRIEN,  
*Attorneys for Appellant.*

*Of Counsel:*

EDWARD SCHAEFFER.

(Appendices Follow)

## **Appendices**

**Appendix A**

(Cite as 19 Cal.3d 514, 138 Cal.Rptr. 586, 564 P.2d 353)

Supreme Court of California  
In Bank

S.F. 23574

Ezra Kulko,	Petitioner,
vs.	
The Superior Court of the City and County of San Francisco,	Respondent;
Sharon Kulko Horn,	Real Party in Interest.

[May 26, 1977]

SULLIVAN,\* Justice.

In this proceeding brought pursuant to section 418.10, subdivision (c), of the Code of Civil Procedure, petitioner Ezra Kulko seeks a writ of mandate directing respondent superior court to vacate its order denying petitioner's motion to quash service of summons for lack of jurisdiction in the underlying action, to establish a foreign judgment of divorce, and to grant said motion. We have concluded that the trial court correctly denied the motion. We deny the petition.

\*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

Viewing the evidence under the well-settled rules governing review of an order based on affidavits,<sup>144</sup> we set forth the pertinent facts.

On September 25, 1972, after 13 years of married life, real party in interest Sharon Kulko (hereafter plaintiff) was granted a decree of divorce from petitioner Ezra Kulko (hereafter defendant) by the Civil Court of Port-au-Prince in the Republic of Haiti. There were two children born of the marriage: Darwin, born June 23, 1961, and Ilsa, born July 10, 1962. Under a written separation agreement, entered into by the parties in New York, their marital domicile, and thereafter attached to and made a part of the decree, it was agreed that during the period of the year when they were attending school Darwin and

<sup>144</sup> "An appellate court will not disturb the implied findings of fact made by a trial court in support of an order, any more than it will interfere with express findings upon which a final judgment is predicated. When the evidence is conflicting, it will be presumed that the court found every fact necessary to support its order that the evidence would justify. So far as it has passed on the weight of evidence or the credibility of witnesses, its implied findings are conclusive. This rule is equally applicable whether the evidence is oral or documentary. In the consideration of an order made on affidavits involving the decision of a question of fact, the appellate court is bound by the same rule as where oral testimony is presented for review." [Citations.] When an issue is tried on affidavits, the rule on appeal is that those affidavits favoring the contention of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and where there is a substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed." (*Griffith v. San Diego College for Women* (1955) 45 Cal.2d 501, 507-508, 289 P.2d 476, 479; see also *Lynch v. Spilman* (1967) 67 Cal.2d 251, 259, 62 Cal.Rptr. 12, 431 P.2d 636; *Doak v. Bruson* (1907) 152 Cal. 17, 19, 91 P. 1001; *Detsch & Co. v. Calbar Inc.* (1964) 228 Cal.App.2d 556, 563, 39 Cal.Rptr. 626; *DeWit v. Glazier* (1957) 149 Cal.App.2d 75, 81-82, 307 P.2d 1031.)

Ilsa should reside with and remain in the care, custody and control of defendant and that during the summer months and Christmas and Easter vacation weeks, they should reside with and remain in the care, custody and control of plaintiff. The agreement recited that defendant resided in New York and plaintiff in San Francisco. Defendant agreed to pay \$3,000 annually for the support of the children during the time they resided with their mother in California.

During 1973, in accordance with the agreement, both children were sent to San Francisco and returned to New York. However, in December 1973, on the eve of her departure to spend the Christmas vacation with her mother, Ilsa informed her father that she wanted to live in California with her mother. Defendant thereupon purchased a one-way airplane ticket for her and she left with all her clothes. Throughout 1974 and 1975 Ilsa resided with her mother in California during the school year and with her father in New York during the summer. At the end of each summer, defendant provided her with an airplane ticket and she returned to live with her mother in San Francisco during the school year.

Meanwhile, throughout this period Darwin had continued to live with his father during the school year and his mother during the summer and on vacation. On January 10, 1976, Darwin telephoned plaintiff from New York, informing her that he was in trouble, that his father did not want him and that he wished to come to San Francisco to live with her. She sent him an airplane ticket and he immediately joined her in San Francisco.

Three weeks later, on February 5, 1976, plaintiff commenced the underlying action to establish the Haitian divorce as a judgment of this state, to award custody of the children to plaintiff and to receive increased child support from defendant. On the same day, the trial court granted plaintiff temporary custody of Darwin and Ilsa and restrained both parties from removing the children from plaintiff's home. Defendant, who had been served with summons by mail in New York, made a special appearance in California and moved for an order to quash service of summons (Code Civ.Proc. § 418.10, subd. (a)(1) for lack of personal jurisdiction in that he was not a resident of California and did not have the requisite minimum contacts with California to satisfy due process requirements. Defendant supported his motion with two personal affidavits and plaintiff responded with an affidavit in opposition. The trial court denied the motion. This proceeding for a writ of mandate followed. (Code Civ.Proc. § 418.10, subd. (c).)

No contention is made before us that the trial court lacked jurisdiction to determine the custody of Darwin and Ilsa. (See Civ.Cod § 5152; *Titus v. Superior Court* (1972) 23 Cal.App.3d 792, 797-198, 100 Cal.Rptr. 477; see *Sampsell v. Superior Court* (1948) 32 Cal.2d 763, 777-779, 197 P.2d 739; Rest.2d Conflict of Laws, § 79, pp. 237-240.) However, in order to impose upon defendant a personal liability to support the children, the court must secure personal jurisdiction over him. (*Titus v. Superior Court, supra*, 23 Cal.App.3d 792, 799, 100 Cal.Rptr. 477; *Schoch v. Superior Court* (1970) 11 Cal.App.3d 1200, 1207, 90

Cal.Rptr. 365. In order to secure personal jurisdiction over a nonresident defendant by service of summons by mail outside California, the trial court must have power to exercise such jurisdiction under section 410.10 of the Code of Civil Procedure which provides: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." This section includes all the recognized bases of judicial jurisdiction (*Quattrone v. Superior Court* (1975) 44 Cal.App.3d 296, 302 118 Cal.Rptr. 548; Judicial Council comment to Code Civ.Proc., § 410.10, 14 West's Ann. Code Civ.Proc. (1973 ed.) p. 459) and manifests an intent that the courts of California utilize all such bases, limited only by constitutional considerations. (*Sibley v. Superior Court* (1976) 16 Cal.3d 442, 445, 128 Cal.Rptr. 34, 546 P.2d 322.)

As we explained in *Sibley*, "One of the recognized bases for jurisdiction in California arises when the defendant has caused an 'effect' in the state by an act or omission which occurs elsewhere." (16 Cal.3d at p. 445, 128 Cal.Rptr. at p. 36, 546 P.2d at p. 324; see also *Judd v. Superior Court* (1976) 60 Cal.App.3d 38, 43, 131 Cal.Rptr. 246; *Quattrone v. Superior Court, supra*, 44 Cal.App.3d 296, 304, 306, 118 Cal.Rptr. 548; *Titus v. Superior Court, supra*, 23 Cal.App.3d 792, 801, 802, 100 Cal.Rptr. 477.) It is at once apparent that the potential scope of this basis of jurisdiction is almost unlimited since any act or omission of a defendant anywhere in the world causing an "effect" in California could theoretically subject him to *in personam* jurisdiction in California. If this theory

of jurisdiction were carried out to its full extremes, it is obvious that it would discourage those outside California from having any contacts or relations with persons living in our state. It has therefore been recognized that the mere causing of an effect in California is not necessarily sufficient to supply a constitutional basis for jurisdiction. "A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an omission or act done elsewhere with respect to causes of action, arising from these effects, unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable." (Judicial Council comment to Code Civ.Proc. § 410.10, 14 West's Ann.Code Civ.Proc. (1973 ed.) p. 472.) In *Sibley*, after alluding to the principles set forth by the United States Supreme Court in *International Shoe v. Washington* (1945) 326 U.S. 310, 316-317, 66 S.Ct. 154, 90 L.Ed. 95, and in *Hanson v. Denckla* (1958) 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283, we attempted to distill the criteria for determining whether or not the exercise of jurisdiction over a nonresident on this basis was reasonable. We emphasized the importance of a showing on the record that the nonresident "purposely availed himself of the privilege of conducting business in California or of the benefits and protections of California laws . . . [or] anticipated that he would derive any economic benefit as a result of his" act outside of California. (16 Cal.3d at p. 447, 128 Cal.Rptr. at p. 37, 546 P.2d at p. 325.) We conclude therefore that once it has been established that a non-resident defendant has caused an effect in this state

by an act or omission elsewhere, the reasonableness of exercising personal jurisdiction over him on this basis may be determined according to the above criteria.

In the case at bench, we are called upon to apply the foregoing principles to an important area of family law, namely acts or omissions by nonresident parents outside of California which affect their children, and their relationship with their children, who are physically present in California. Initially we observe that probably no parental act more fully invokes the benefits and protections of California law than that by which a parent permits his minor child to live in California. The parent thereby avails himself of the total panoply of the state's laws, institutions and resources—its police and fire protection, its school system, its hospital services, its recreational facilities, its libraries and museums, to mention only a few. Therefore, we start with the premise that a nonresident parent who allows his minor child or children to reside in California has by that act purposely availed himself of the benefits and protections of the laws of California to such an extent that absent unusual circumstances or countervailing public policies such act would support personal jurisdiction over the non-resident parent for actions concerning the support of these children.

Two recent opinions by the Courts of Appeal have identified strong public policies affecting the reasonableness of asserting personal jurisdiction over non-resident parents of children physically present in the

state. In *Titus v. Superior Court*, *supra*, 23 Cal.App. 3d 792, 803, 100 Cal.Rptr. 477, 485, the court said: "It is a strong policy of the law to encourage the visitation of children with their parents. Such a policy should be fostered rather than thwarted." In *Judd v. Superior Court*, *supra*, 60 Cal.App.3d 38, 45, 131 Cal.Rptr. 246, 249, a different appellate district declared: "It should be a matter of strong public policy to encourage the payment of support and communication between a natural father and his children, not to discourage the same by subjecting the father to the expense and inconvenience of relitigating this matter of support in our state." In each case the Court of Appeal, upon application of these strong public policies to the particular facts before it, concluded that it would be unreasonable to impose personal jurisdiction.

In *Titus*, the father, who has custody of the children under a Massachusetts divorce decree, sent the children to California to visit their mother for the summer, pursuant to a subsequent written custody agreement. The agreement specified that the children were to be returned to the father in Massachusetts by the end of August. The mother, in breach of the agreement, retained the children, and brought an action in California to establish the foreign divorce decree as a judgment, to obtain custody of the children and to secure support payments from the father. While the father may have in a sense purposely availed himself of the benefits and protections of the laws of California by sending his children here, his

purpose was merely to have them visit their mother for a limited time and in compliance with the written agreements between the parents, which also provided for child support payments by him to the mother during the visit. It was clear that the purpose of the father's act was supported by a strong policy of the law which would be thwarted if the parent thereby became subject to personal jurisdiction. "If a parent, who has custody of his children, is faced with the prospect of submitting himself to the jurisdiction of another state by the mere act of sending his children to that state for the purpose of visiting with the other parent, it is reasonable to assume that he would refrain from doing so rather than running such risk, particularly in view of the inconvenience and costs attendant to litigating in another state." (23 Cal.App. 3d at p. 803, 100 Cal.Rptr. at p. 485.)

In *Judd*, the parties had lived in New York and Connecticut until their separation. They entered into a written separation agreement and the wife then obtained a Mexican divorce decree which incorporated the terms of the separation agreement. She then moved to California with the minor children of whom she had custody. The father never resided in California but visited the children there and, pursuant to their agreement, sent the mother spousal and child support payments. Ten years after her Mexican divorce, the mother filed a petition for dissolution of marriage in California, seeking among other things custody of the children and spousal and child support. The Court of Appeal issued a writ of mandate directing the quashing

of the service of summons on the father insofar as the summons purported to exercise personal jurisdiction over the father for spousal and child support. In *Judd* the father had not purposely availed himself of the protections and benefits of the laws of California since he had never had custody of the children and had not sent them to California. The Court of Appeal concluded that it would be neither fair nor reasonable to hold that this state acquired jurisdiction over the father merely because he sent support payments to California, communicated with his children by mail or telephone, and visited them here, since to do so would thwart the public policy of encouraging a parent's support of, and communication with his children.

In the case at bench, defendant sent Ilsa to California in December 1973 to visit her mother for the Christmas vacation in accordance with terms of the separation agreement incorporated in the divorce decree. Under *Titus* it is clear that this act in itself would not confer jurisdiction over defendant. At that time, however, defendant knew that Ilsa wanted to stay permanently with her mother in California and in apparent recognition of this desire he purchased for Ilsa only a one-way ticket and allowed her to take all her clothing. These facts would suggest that defendant at least contemplated surrendering custody of Ilsa to the mother in California and sent her to California with an apparent intention of allowing her to remain and thereafter reside permanently there. This intention was finalized in 1974 when Ilsa returned to New York to spend the summer with defendant.

At the end of the summer, he bought her a ticket to return to California to live with her mother for the school year. The same procedure was repeated in the summer of 1975. Thus it is clear that defendant actively and fully consented to Ilsa living in California for the school year and that he twice sent her to California for that purpose. Here, unlike *Titus*, defendant did not send Ilsa to California for a mere temporary visit, but for permanent residence with plaintiff subject only to summer visits in New York. By doing so, defendant purposely availed himself of the full protection and benefit of California laws for the care and protection of Ilsa on a permanent basis. In view of the factor of Ilsa's permanent residence here, we apprehend no thwarting of the public policy supported by the *Titus* court.

We deem it fair and reasonable to extend the jurisdiction of the courts of this state over defendant on the basis of his acts of sending Ilsa into this state to reside permanently with her mother. Not only has defendant by these acts availed himself of the full benefit and protection of the laws of this state, but he has also derived immediate economic benefit from them. Under the terms of the decree, he had custody of Ilsa and was liable for her support while she lived with him. He paid support to the mother under the decree only for the summer, Christmas and Easter vacations. Therefore, by allowing the child to live with the mother throughout the school year, he was no longer liable for the child's support for that period—a clear economic benefit.

We observe, however, that while defendant's acts with respect to Ilsa form a basis to confer personal jurisdiction over him, he has not by any act or omission outside California with respect to his other child, Darwin, caused an effect in this state which independently of the foregoing considerations would confer such jurisdiction. It will be recalled that Darwin came to California to live permanently with his mother at his own request, by an airplane ticket paid for and sent to him by his mother, and without defendant's knowledge. It would appear that subsequently defendant consented to this *fait accompli* in that he has not undertaken any action to retrieve the child and has even indicated his assent to this state of affairs by letter. Nevertheless, although he has consented to Darwin's permanent residence in California, and he will thereby derive economic benefit by no longer being liable for Darwin's support throughout the school year, the fact remains that he at no time undertook any affirmative act to purposely avail himself of the benefit and protection of the laws and institutions of this state. He did not send Darwin to California, nor indeed know of the latter's departure from New York beforehand. Therefore, under the principles set forth above, defendant would not have been subject to jurisdiction in personam in California for Darwin's support, if Darwin were the sole child of the parties.

Nonetheless, we conclude that this fact does not deprive the court of personal jurisdiction over defendant for the support of *both* children since the

support of both is presented as a single issue in the underlying action. The separation agreement, which was incorporated into the Haitian decree sought to be established as a judgment of this state, provided for the payment of \$3,000 annually for the support of *both* children. The complaint seeks support for both children. Defendant's motion to quash and supporting affidavits assert lack of jurisdiction over both children. We deem it fair and reasonable for defendant to be subject to personal jurisdiction for the support of both children, where he has committed acts with respect to one child which confers personal jurisdiction and has consented to the permanent residence of the other child in California.<sup>2</sup>

The alternative writ of mandate is discharged and the petition for a peremptory writ is denied.

TOBRINER, Acting C. J., and MOSK and WRIGHT (Retired Chief Justice of the Supreme Court sitting under assignment by the Acting Chairman of the Judicial Council), JJ., concur.

RICHARDSON, Justice, dissenting.

I respectfully dissent. In my view, it is unreasonable to subject petitioner to the jurisdiction of the California courts under the circumstances in this case. Petitioner's contacts with this state are far too minimal to justify in personam jurisdiction on any of the accepted and recognized bases.

<sup>2</sup>To the extent that *Starr v. Starr* (1953) 121 Cal.App.2d 633, 263 P.2d 675, is inconsistent with the views expressed in this opinion, it is disapproved.

It is uncontradicted that petitioner has never resided in California and has had only two brief, isolated contacts with the state during his entire life. He is a resident of New York, the site of the marital domicile, and he has no business interests in California. As the majority indicates, after the parties separated respondent wife obtained a divorce in Haiti and moved to California where, pursuant to agreement with petitioner, she visited with the children during the summer and holidays. Petitioner maintained custody of the children in New York during the school year.

According to respondent's affidavit in opposition to petitioner's motion to quash, in December 1973 "Ilsa told her father before she left for Christmas vacation that she wanted to live with her mother now." Petitioner allegedly acceded to Ilsa's announcement, bought her a one-way air ticket to California, and since that time has seen Ilsa in New York only during the summers. As for son Darwin, respondent, in her affidavit, alleged that in January 1976 Darwin called her and told her he wanted to come to San Francisco to live, that she sent him a plane ticket, and that he (and Ilsa) presently live with respondent in California. (We may assume the truth of the foregoing allegations, although it is noteworthy that petitioner's own affidavit alleged that respondent induced both Ilsa and Darwin to leave New York without petitioner's knowledge or consent.)

I have no quarrel with the majority's statement of general legal principles, derived primarily from

our recent decision in *Sibley v. Superior Court* (1976) 16 Cal.3d 442, 128 Cal.Rptr. 34, 546 P.2d 322, and cases cited therein. As *Sibley* explains, however, "The mere causing of an 'effect' in California . . . is not necessarily sufficient to afford a constitutional basis for jurisdiction; notwithstanding this 'effect,' the imposition of jurisdiction may be 'unreasonable.'" (P. 446, 128 Cal.Rptr. p. 37, 546 P.2d p. 325.) In determining whether or not to impose jurisdiction, *Sibley* explains that it is necessary for the court to ascertain whether the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." (P. 447, 128 Cal.Rptr. p. 37, 546 P.2d p. 325, italics added.) In *Sibley*, we were quoting from the leading Supreme Court opinion in *Hanson v. Denckla* (1958) 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed.2d 1283 which expressed as follows the controlling principle relevant to our determination: "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

Noting that the nonresident's conduct must be "purposeful," I disagree with the majority's application

of the foregoing principles to the particular facts of this case. As to Ilisa, the majority describes petitioner's conduct as "actively and fully consent[ing] to Ilisa living in California" subject only to summer visits in New York and hold that such conduct constitutes sufficient ground upon which to confer personal jurisdiction over petitioner. In the majority's eyes, petitioner "purposely availed himself of the full protection and benefit of California laws for the care and protection of Ilisa on a permanent basis." (Ante, p. 59) of 138 Cal.Rptr., p. \_\_\_\_\_ of \_\_\_\_\_ P.2.) If, however, we are to give any reasonable meaning to the phrase "*purposely* availed," the record before us discloses no evidentiary support whatever, even if we disregard petitioner's recitation of events and accept respondent's version. Petitioner may have purchased Ilisa's air passage to California, but my reading of the record indicates no *purposeful* conduct by him which reasonably can be said to invoke the benefits and protections of California laws, thereby conferring in personam jurisdiction over him. At best, petitioner passively acquiesced in his teenaged daughter's unilateral decision to live in California.

The majority reasons, without citation of supporting authorities, that whenever a parent "permits" his minor child to reside in California, the parent thereby "avails himself of the total panoply of the state's laws, institutions and resources . . . ." (Ante, p. 589 of 138 Cal.Rptr., p. \_\_\_\_\_ of \_\_\_\_\_ P.2.) Yet, can such an act of acquiescence fairly and realistically be viewed as "purposeful" conduct? According to re-

spondent, Ilisa "told" petitioner that she was going to live with respondent in California. Petitioner's unresisting assent to Ilisa's decision discloses no intent on his part, purposeful or otherwise, to enjoy the "panoply" of California's resources.

If, however, petitioner's actions with respect to Ilisa can be rationalized as "purposeful conduct," there is no basis on which to support in personam jurisdiction over petitioner as to Darwin. The record reveals that, as to his son, petitioner has done absolutely nothing which can be said to have caused an effect in California. Darwin came to live in California at his own request and without petitioner's knowledge. Petitioner neither knew of, nor lifted a finger to assist, Darwin's flight to California. His airplane ticket was paid for by respondent. All that can be said is that when petitioner learned of the development he passively accepted a situation not of his own making. He took no action, direct or indirect, to invoke the protections of California's laws. Under such circumstances, no basis exists in this record upon which to impose in personam jurisdiction over petitioner as to Darwin's.

The majority imposition of in personam jurisdiction over absent parents under circumstances such as here presented may well conflict with the "strong" public policy which California courts have asserted favoring the visitation of children with their parents, and encouraging cooperation between parents. (See *Judd v. Superior Court* (1976) 60 Cal.App.3d 38, 45, 131 Cal.Rptr. 246; *Titus v. Superior Court* (1972)

23 Cal.App.3d 792, 803, 100 Cal.Rptr. 477.) The rule announced by the majority may encourage a divorced parent such as petitioner to forbid or physically prevent his or her children from visiting a California parent, lest in personam jurisdiction be thereby conferred over the nonresident parent. Such parents may well become extremely guarded and cautious when they suspect that a child's change of residence is contemplated or effected, either unilaterally or with the connivance of the California parent. Prudent nonresident parents may simply refuse all cooperation and visitation whatever, thus contravening well established public policies.

Finally, were we to hold that petitioner's contacts in California were insufficient to justify imposition of in personam jurisdiction over him, respondent would not be rendered wholly remediless. No reason appears of record why respondent could not retain New York counsel to pursue the action against petitioner in the state where he resides.

I would issue the writ.

CLARK, J., concurs.

# Appendix B

(Cite as App., 133 Cal.Rptr. 627)

Court of Appeal, First District,  
Division 4.

Civ. 39296.

Ezra Kulko,	Petitioner,
vs.	
Superior Court of the State of California for the City and County of San Francisco,	Respondent,
Sharon Kulko Horn,	
	Real Party in Interest.

[Oct. 8, 1976.]

[Hearing Granted Dec. 16, 1976.]

EMERSON,\* Associate Justice (Assigned).

Petitioner seeks a writ of mandate after respondent court denied his motion to quash service of summons. The action underlying the petition is brought by real party in interest, Sharon Horn, who is petitioner's former wife and the mother of their two children. The complaint seeks establishment as a

\*Retired Judge of the Superior Court sitting under assignment by the Chairman of the Judicial Council.

California judgment of a foreign divorce decree (Haiti) and also requests orders for custody and support of the children.

Petitioner concedes that the superior court has jurisdiction of the subject matter of the action and also has authority to determine the question of child custody. He contends, however, that the court lacks personal jurisdiction to impose upon him an obligation of increased child support.

It has been determined that a California court cannot impose upon a father a personal liability or obligation for child support unless it obtains personal jurisdiction over him. (*Titus v. Superior Court* (1972) 23 Cal.App.3d 792, 100 Cal.Rptr. 477.) The relevant principles of the California law pertaining to personal jurisdiction in *Titus* were summarized as follows: "In order to obtain personal jurisdiction over petitioner by service outside the state, it is necessary that the California court have power to exercise such jurisdiction under Code of Civil Procedure section 410.10 which provides: 'A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.' The general provision is said 'to incorporate in California law, without specific statute or decision by our own courts, any basis of jurisdiction established now or in the future by courts properly appraising constitutional limitations.' (1 Witkin, Cal.Procedure (2d ed. 1970) § 7, p. 532.) [1] Witkin observes that the recognized bases of judicial jurisdiction are those listed in the Restatement and

that these have, in essence, been incorporated in Code of Civil Procedure section 410.10. (See 1 Witkin, Cal.Procedure (2d ed. 1970) § 72, pp. 601-602.) These bases are the following: '(a) presence; (b) domicile; (c) residence; (d) nationality or citizenship; (e) consent; (f) appearance in an action; (g) doing business in the state; (h) an act done in the state; (i) causing an effect in the state by an act done elsewhere; (j) ownership, use or possession of a thing in the state; (k) other relationships to the state which make the exercise of judicial jurisdiction reasonable.' (Rest.2d Conflict of Laws, § 27, p. 120; see 1 Witkin, Cal.Procedure (2d ed. 1970) § 77, pp. 601-602.)" (*Id.* at p. 799, 100 Cal.Rptr. at p. 483.)

Under the facts of this case, petitioner is subject to California's personal jurisdiction only if his conduct fell within the provision of subparagraph (i) of the bases listed above, that is, that he caused an effect in this state by an act done elsewhere.

If he consented to the decision of his children to move to California and to take up residence with their mother it is clear that such conduct was an act, or acts, causing an effect in this state. The mother is now faced with the direct and immediate financial burdens of providing for the children's food, shelter, clothing, schooling, and other needs. That petitioner recognizes this effect is apparent from the following language contained in a letter which he wrote to the mother: "I would like to renegotiate the original agreement with you in as much as it is invalidated. I would like for you to present to me

what you feel would be a fair & equitable arrangement. I would like to do it without lawyers as you know how I feel about them."

The question whether petitioner voluntarily consented to his children's residence in California is one of fact. It was presented to the court on conflicting evidence. Although the judge made no finding on this point we must assume that he resolved it in favor of real party, since this result supports his decision. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, 86 Cal.Rptr. 65, 468 P.2d 193; 6 Witkin, Cal.Procedure (2d ed. 1971) Appeal, § 235, pp. 4225-4226.)

The alternative writ of mandamus is discharged and the petition for a peremptory writ is denied.

RATTIGAN, Acting P. J., and CHRISTIAN, J., concur.

### Appendix C

Superior Court of the State of California  
for the City and County of San Francisco  
Department 10

No. 701-626

Sharon Kulko Horn	} Plaintiff,
vs.	
Ezra Kulko	
	Defendant.

[May 17, 1976]

### MINUTE ORDER

The motion of the respondent to quash the service and summons of the petitioner is hereby ordered denied.

Dated 5/17/76

/s/ S. Lee Vavuris

S. Lee Vavuris

Judge of the Superior Court

**Appendix D**

**In the Supreme Court of the State of California**

**S.F. 23574**

Ezra Kulko,

Petitioner,

vs.

Superior Court of the State of California in  
and for the City and County of San Fran-  
cisco,

Respondent,

Sharon Kulko Horn,

Real Party in Interest.

**NOTICE OF APPEAL TO THE SUPREME  
COURT OF THE UNITED STATES**

Notice is hereby given that Ezra Kulko, the ap-  
pellant above-named, hereby appeals to the Supreme  
Court of the United States from the final judgment  
of The Supreme Court of the State of California  
denying Appellant's Petition for a Writ of Man-  
date entered in this proceeding on May 26, 1977.

This appeal is taken pursuant to Title 28, United  
States Code, Section 1257, subparagraph (2).

Dated: August 1, 1977.

/s/ Lawrence H. Stotter  
Lawrence H. Stotter  
465 California Street #400  
San Francisco, California 94104